

UPDATE

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2016 CASE LAW UPDATE

The following is a brief summary of the opinions rendered by the United States Supreme Court, Kentucky Supreme Court, and Kentucky Court of Appeals that impact victims of crime and their cases with emphasis regarding victims of domestic violence, adult and child sexual assault and abuse, human trafficking and crime victims' rights. The complete opinions of the state courts, listed below, as well as any other cases rendered by the Kentucky appellate courts can be found at: <http://courts.ky.gov/courts/supreme/Pages/SupremeCourtMinutes.aspx> (KY Supreme Court) and <http://courts.ky.gov/courts/coa/Pages/minutes.aspx> (KY Court of Appeals). The opinions of the United States Supreme Court can be found at <https://www.supremecourt.gov/opinions/opinions.aspx>.

UNITED STATES SUPREME COURT

***Voisine v. United States*, ___ S.Ct. ___, 579 U.S. ___, 2016 WL 3461559**

Facts:

Following denial of his motion to dismiss, Voisine entered a conditional guilty plea in the United States District Court for the District of Maine to possession of a firearm after having been convicted of a misdemeanor crime of domestic violence. The Court of Appeals affirmed. In a separate case, William Armstrong entered a conditional guilty plea in the same court to possessing firearms and ammunition after having been convicted of a misdemeanor crime of domestic violence. Armstrong's conviction was also affirmed by the Court of Appeals. Certiorari was granted and the Supreme Court vacated and remanded for further consideration. On remand the Court of Appeals affirmed. Certiorari was once again granted and both convictions were upheld.

In 2004 Stephen Voisine pleaded guilty to assaulting his girlfriend in violation of a Maine state law which makes it a misdemeanor to “intentionally, knowingly or recklessly cause bodily injury or offensive physical contact to another person.” A violation of this statute qualifies as a misdemeanor crime of domestic violence under 18 U.S.C. Sec. 922(g)(9) if the victim is a family or household member. Several years later, Voisine was investigated for killing a bald eagle. During this investigation law enforcement officers learned that Voisine owned a rifle. A background check revealed his previous misdemeanor conviction and he was charged with and later entered a conditional guilty plea to violating 18 U.S.C. Sec. 922(g)(9) which makes it a crime for a person convicted of a misdemeanor crime of domestic violence to possess a firearm. See also 18 U.S.C. Sec. 921(a) (33) (A) which defines “misdemeanor crime of domestic violence.

The second petitioner/appellant, William Armstrong III pleaded guilty in 2008 to assaulting his wife in violation of Maine’s domestic violence assault statute that makes it a misdemeanor to commit an assault against a family or household member. A few years later, police searched Armstrong’s residence as a part of a narcotics investigation. During this search, the police discovered six guns and a large quantity of ammunition. Armstrong was charged under 18 U.S.C. Sec. 922(g)(9) for unlawfully possessing firearms.

Question presented:

Whether 18 U.S.C. Sec. 922(g)(9) applies to reckless assaults, as it does to knowing or intentional ones.

Reasoning and Holding:

Justice Elena Kagan delivered the opinion for the 6-2 majority. In reaching its holding that a reckless domestic assault qualifies as a “misdemeanor crime of domestic violence” under 18 U.S.C. Sec. 922(g)(9) the Court reviewed both the statutory text and the history of the statute.

The Court found that the relevant statutory text - “using force” - does not rule out an interpretation which would encompass an act of force carried out recklessly or with a conscious disregard of the substantial risk of causing harm. The Court notes that although the statutory language did not apply to true accidents, it certainly does to reckless conduct. “In sum, Congress’s definition of a ‘misdemeanor crime of domestic violence’ contains no exclusion for convictions based on reckless behavior. A person who assaults another recklessly ‘uses’ force, no less than one who carries out that same action knowingly or intelligently.” p. 6.

The legislative history also supports this same reading of the statute. The Court notes that Congress expressly intended for 18 U.S.C. Sec. 921 and 922 to prevent Defendants who were convicted of misdemeanors of domestic assault from being able to purchase firearms. The statutory language “naturally read, encompasses acts of force undertaken recklessly. . . . The state-law backdrop to that provision, which included misdemeanor assault statutes covering reckless conduct in a significant majority of jurisdictions, indicates that Congress meant just what it said.” p. 8. Appellants’ possession of a gun, following a conviction for abusing a domestic partner therefore violates 18 U.S.C. Sec. 922(g)(9).

KENTUCKY SUPREME COURT

***Dickerson v. Commonwealth*, 485 S.W.3d 335 (Ky. 2016) (Affirming)**

Facts:

This was an appeal from a conviction of murder and four counts of first degree criminal abuse. Appellant received a life sentence.

The appellant was convicted in the death of a two year old child who was staying in the home of appellant and his wife Gladys, the child's aunt. The victim and his four siblings were in the home as a result of being removed from the custody of their mother by social services. The victim died from sustaining severe physical trauma to his abdomen and other parts of his body. Although the nature of the injuries themselves was in dispute, it was for the most part indisputable that the two year old victim suffered severe physical abuse in the weeks and months leading up to his death. Gladys was also charged with the child's death but was tried separately. She testified against appellant at his trial.

Questions Presented:

- Whether admission of evidence of appellant's other-bad-acts – a history of domestic violence against his wife - was error.
- Whether there was error in the admission of hearsay statements made to an examining pediatrician and an investigating detective.
- Whether prosecutorial misconduct occurred during cross-examination of an expert witness and in closing argument.

Reasoning and Holding:

First, on the issue of whether the admission of other-bad-acts evidence was error the Court found that the trial court did not abuse its discretion in allowing the testimony of appellant's spouse that she had previously been abused by him.

The appellant argued that the testimony was not offered for any "other purpose" than to show he acted in conformity with those acts. However, the Court found that the testimony was relevant for the "other purpose" of showing that Gladys was "afraid" of the appellant. Gladys claimed that it was because of that fear "that she had never reported his abuse of the children, had lied to the social workers and others investigating the children's mother's reports of suspected child abuse, and had given false exculpatory statements to emergency responders and law enforcement immediately following Watson's death." p. 321. Because the evidence was relevant for that purpose it was admissible "if its probative value in explaining why she lied to police and failed to report Dickerson's abuse of the children (because she was scared of him) outweighed the unfair prejudice arising from its tendency to prove Dickerson's violent-character." The Supreme Court held that the trial court acted well within its discretion in allowing the testimony to be admitted. There was no error.

Second, the appellant argued that reversible error occurred during the trial in the admission of hearsay statements made to an examining pediatrician and an investigating detective. The Court disagreed.

The treating pediatrician was originally allowed, over objection of the appellant, to testify that "Cameron told her that Dickerson had hit him with a belt" and that Cameron "said that the 'big white boy' at their new trailer had 'hurt his nose.'" The judge overruled the objection and the appellate court found that it was clear that the judge considered the parties' arguments and then advised the Commonwealth that he was getting close to exceeding the scope of the KRS 803(4) exception (statements made for the purpose of medical treatment or diagnosis) to the hearsay rule. The court found no error, stating that even if there were error, it would be harmless.

An investigating detective interviewed 14 witnesses regarding appellant's defense that the child's fatal injury was caused by a "white-headed boy" on the playground or swing-set at a trailer park in Johnson County. At trial the detective was permitted, over appellant's objection, to answer the question "After investigating the claims about the playground incident, did you find any evidence at all to suggest that anything like what the defendant described ever occurred?" The detective responded "No." The Commonwealth argued and the trial court agreed that the detective's response did not constitute hearsay and was therefore properly admitted because the testimony did not repeat any express statements of the interview subjects. Instead, it was a conclusion drawn by the detective from his investigation. On appeal, the Court disagreed finding that "the in-court testimony relaying those out-of-court-statements to the jury, albeit by summarizing them, was certainly offered to prove the truth of the matter they asserted. Merely summarizing them does not change their hearsay character." p. 326.

Once the Court determined that the testimony was in fact hearsay it turned to the issue of whether or not admission of the testimony was error. In determining whether or not the testimony violated appellant's Sixth Amendment confrontation rights the Court applied a three-part analysis: (1) whether the out-of-court statements were testimonial, (2) whether the out-of-court speakers were unavailable to testify and (3) whether appellant had an opportunity to cross-examine them.

First, the Court found that it was "beyond dispute that the hearsay statements here were testimonial; they were made to law enforcement in the course of an investigation that was undertaken solely to discover facts and evidence that might prove relevant in a subsequent criminal prosecution, and thus were prototypical of testimonial hearsay." p. 326. As for prongs two and three of the test, unavailability of witnesses and right to cross-examine, the Court found that the Commonwealth did not seriously contest either of these points. However, because four (4) of the witnesses testified at trial the court found no confrontation violation. This did not, however, cure the confrontation violation altogether because appellant did not have the right to confront the nine other witnesses about their out-of-court statements. The Court then moved to a harmless error analysis. The standard for harmless error when constitutional error is involved is "whether we are convinced 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" p. 328. Applying this standard the court found that "in light of the overwhelming evidence of Dickerson's guilt, we must conclude that this is just such a case where the improper evidence was harmless beyond a reasonable doubt."

Finally, appellant argued that prosecutorial misconduct occurred during cross-examination of an expert witness and in closing argument which constituted reversible error. After setting out the standard for reversal based upon prosecutorial misconduct and applying it to the facts of the case the Court rejected appellant's argument and held that no reversible error occurred.

***Howard v. Commonwealth*, 484 S.W.3d 295 (Ky. 2016) (Affirming)**

Facts: Appellant entered a conditional guilty plea to three counts of incest, one count of first-degree sexual abuse and first-degree PFO. He was sentenced to 20 years imprisonment.

Question Presented:

Whether Kentucky's incest statute, KRS 530.020(1), criminalizes sexual intercourse between a stepfather and his adult stepdaughter.

Reasoning and Holding:

Appellant argues that the incest statute does not criminalize consensual sexual intercourse between non-blood related adults who never had a parent/child relationship. Howard further argues that the ordinary meaning of "child" in stepchild refers only to the minor child of one's spouse by a former partner.

The Court examined the ordinary meaning of the word "child" by referring to the Oxford Dictionary. The dictionary defined "child" as a person who is considered a minor and also as a term which applies to "offspring of a parent, regardless of age". Therefore in the context of the incest statute, stepchild refers to the son or daughter of one's spouse by a former partner at any age.

Next the Court analyzed the statute in context of the consent of the parties as it related to their status as adults. Specifically, the incest statute clearly states in the penalties portion of KRS 530.020 (2(a)), that incest between two consenting adults is a Class C Felony. The Court states, "After reading both sections together, it becomes clear, that the age of the victim is not an element of the offense except for determining the class of the felony committed." The Court went on to state that when drafting the statute it appears that the legislature contemplated this fact scenario. The legislature sought to prohibit this activity as it relates to their relationship.

The Court goes further stating that their position is consistent with former cases in Kentucky, citing Dennis v. Commonwealth, 156 S.W. 2d 759, 762 (Ky. App. 2004) as well as other cases related to this issue.

***Bartley v. Commonwealth*, 485 S.W3d 335 (Ky. 2016) (Affirming)**

Facts:

Appellant was convicted of two counts of first-degree sodomy and two counts of first-degree sexual abuse. After the verdict an agreement was reached between appellant and the Commonwealth and the court sentenced him to 25 years imprisonment. Appellant and his first wife, Laura, had three children and a tumultuous marriage. Laura left the marriage before their children started school and there was a lengthy and acrimonious custody battle. Bartley eventually remarried and during the majority of the time period at issue, he lived with his three children, his second wife and her two children. Appellant's convictions result from his middle child, R.B., reporting that she was sexually abused by him beginning when she was three or four years old and continuing until she was nine or ten.

Questions Presented:

- Whether denial of appellant's pre-trial motion to dismiss the indictment was error.
- Whether it was error for the court to grant the Commonwealth's intra-trial motion to amend the indictment.
- Whether appellant was substantially prejudiced by testimony about prior and uncharged bad acts and by testimony regarding the victim's behavior while in foster care.
- Whether the court erred in failing to grant appellant's motion for a directed verdict.

Reasoning and Holding:Denial of Motion to Dismiss the Indictment

While the court recognized that the indictment was "bare bones" containing only the specific crimes charged and the range of dates within which the offenses occurred, it noted that the Commonwealth also supplemented the indictment with the recording of the victim's statement and provided additional details in a letter to appellant's counsel. According to the Court the details were sufficient to apprise appellant of the offenses with which he was charged and to permit him to plead prior conviction should he be charged with the same offense in the future. As a result there was no error occurred in denying the motion.

Granting of the Commonwealth's Intra-trial Motion to Amend the Indictment

RCr 6.16 permits an indictment to be amended any time before the verdict if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. Appellant did not argue that the amendment resulted in different or additional charges but instead argued that the amendment prejudiced his right to present a defense because it made it impossible to develop an alibi defense. The court rejected appellant's argument stating that appellant was aware of the charges against him and the general time frame when the charged incidents occurred and also noted that the Commonwealth took steps to advise appellant more specifically what the charges entailed. The Court held there was no prejudice to any of appellant's substantial rights when the trial court allowed the indictment to be amended to conform to the evidence.

Uncharged Sexual Acts Testimony

R.B. testified, without objection, regarding uncharged sexual acts involving R.B. and appellant. Appellant argues that this testimony unfairly prejudiced him during the trial. The Court found that R.B.'s testimony was properly admitted to prove intent, plan, or absence of mistake or accident. Citing *Noel v. Commonwealth*, 76 S.W. 3d 923, 931 (Ky. 2002) and *Harp v. Commonwealth*, 266 S.W.3d 813, 822 (Ky. 2008). The admission of this testimony did not rise to the level of palpable error. Similarly, spontaneous, unsolicited testimony by R.B. on cross-examination about uncharged sexual acts was harmless error and not grounds for a mistrial.

Physical Abuse

One of Appellant's defenses at trial was that R.B.'s testimony regarding the events that led to the conviction were fabricated. In support of this position appellant noted during his opening statement that despite being involved with social workers, teachers and counselors for years, R.B. did not disclose abuse until she was facing criminal charges. On cross examination by appellant, R.B. was asked what she told her teachers. In response R.B. testified that she had not told her teachers about any sexual abuse, but told them appellant hit her because she had

“bruises and marks”. Appellant argued on appeal that this testimony should not have been admissible due to the fact that it was not probative of whether or not the crimes of sexual abuse and sodomy occurred.

The Court acknowledged that testimony regarding physical abuse would generally have been inadmissible if offered only to prove appellant’s bad character or criminal predisposition. However, in this case the evidence was admitted in response to appellant’s raising of the issue of R.B.’s failure to tell anyone about the sexual abuse and sodomy. The Court stated, “Evidence of his physical abuse was relevant and admissible to explain why [R.B.] waited several years to tell anyone, an issue independent of character and criminal predisposition.”

Habit Testimony

Appellant further argued that the testimony of R.B.’s foster-care father, Keith Stratton, was inadmissible due to the fact that such testimony is prohibited as testimony of Child Sexual Abuse Accommodation Syndrome, citing *Sanderson v. Commonwealth*, 291 S.W. 3d. 610 (Ky. 2005) and *Kurtz v. Commonwealth*, 172 S.W. 3d 409, 414 (Ky. 2005). These cases state that a party cannot introduce evidence of the habit of a class of individuals either to prove that another member of the class acted that same way under similar circumstances or to prove that the person was a member of that class because he/she acted that same way under similar circumstances.

During the trial, the Commonwealth received testimony from Mr. Stratton that R. B. was apprehensive when she first came to live with his family, fearing that someone might “try to get her”. Stratton further testified that R.B. “was the most apprehensive child that I’ve had to this point.” Appellant argued that this testimony is impermissible habit evidence.

The Court disagreed and found Stratton’s testimony did not rise to the level of Child Sexual Abuse Accommodation Syndrome testimony and did not pose a problem for seven reasons including:

1. Stratton was not a medical professional; therefore his testimony does not carry the weight of a medical professional.
2. Stratton was not comparing R.B. to sexually abused children, only to other foster children.
3. Stratton did not state that R.B. was apprehensive because she was sexually abused, or even that sexually abused children act apprehensively.

Because this testimony did not result in manifest injustice or rise to the level of palpable error appellant’s argument was rejected.

Motion for a Directed Verdict

Appellant argued that the trial court should have granted his motions for a directed verdict because R.B.’s testimony was “uncorroborated and inherently improbable.” Citing *Garrett v. Commonwealth*, 48 S.W.3d 6, 10 (Ky. 2001) the Court recognized that ‘corroboration in a child sexual abuse case is required only if the unsupported testimony of the victim is ‘contradictory, incredible or inherently improbable.’” p. 347. While recognizing that R.B.’s testimony about when she disclosed was inconsistent the Court noted that appellant was free to attack her

credibility based on that testimony and also noted that her testimony about specific acts of abuse was not inconsistent. “This evidence was as specific as, if not more specific than, evidence in other similar cases, and any inconsistency about when [R.B.] disclosed the abuse was not so severe as to render the remainder of her testimony inherently improbable.” p. 347. The evidence taken in the light most favorable to the Commonwealth was more than sufficient to support the denial of appellant’s motions for directed verdict. There was no error.

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